No. 03-1382

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In the Supreme Court of the United States

October Term 2003

STEPHEN J. HUFFMAN, Warden, *Petitioner*,

v.

RICHARD M. FRAZIER, *Respondent*.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent asks leave to file the attached brief in opposition to Petitioner's petition for a writ of certiorari and to proceed *in forma pauperis*.

The United States Court of Appeals for the Sixth Circuit has appointed Respondent's counsel under the Criminal Justice Act of 1964, 18 U.S.C. §3006A.

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On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

1. Whether this Court should review the Sixth Circuit panel's application of *Strickland v. Washington* in granting Respondent a conditional writ of *habeas corpus* on his capital sentence where that decision: (a) was based on the particular circumstances of this case; (b) applies the established precedents of this Court; and (c) does not conflict with the decisions of other courts of appeals.

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INTRODUCTION

The petition, despite the State's attempts otherwise, presents no significant or important legal issues and no conflict among the courts of appeals. At bottom, this is a case in which the court of appeals applied well-established precedents from this Court, consistent with decisions from other courts of appeals, and granted conditional *habeas* relief limited to Respondent Richard M. Frazier's criminal sentence. The State's petition vastly overstates and exaggerates the reach of the court of appeals decision, which is plainly limited to the specific circumstances presented in this case. Thus, while the State continues to disagree with the panel's result in this case, it has not presented a compelling argument for review by this Court.

The petition attacks the Sixth Circuit's specific application of *Strickland v. Washington* here. In an attempt to make this case into more than one particular result in one particular case, the State suggests that the court of appeals made a legal error with respect to application of *Strickland*. But that contention is belied by the decision's own language, which correctly cites all of the legal standards applicable to this case, and by subsequent decisions of the Sixth Circuit, which in no way suggest that the present case resulted in a sea change in *habeas* law.

The state asserts that the Sixth Circuit decision conflicts with the decisions of other courts of appeals, but the Sixth Circuit itself perceived no conflict with any other court on any other issue. The Sixth Circuit's decision makes no broad legal pronouncements and does not announce any new legal rules or standards. The cases that are cited by the State that supposedly "conflict" with the court of appeals decision here all involved the application of settled legal principles to completely different, case-specific situations.

Finally, this case is not a good vehicle for this Court's review. The result would likely be reaffirmed on remand based on Respondent's wholly separate theory of prosecutorial misconduct, which was explicitly reserved for decision by the Sixth Circuit given the result in the case.

STATEMENT OF THE CASE

Respondent was found guilty of murder in Ohio state court in August 1991. The jury that convicted him recommended a death sentence, which was adopted by the trial judge. *Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2003), Petition Appendix A at 6a. At trial, the prosecution augmented its circumstantial case with pervasive acts of prosecutorial misconduct, including references to the victim's character during closing and rebuttal arguments, using a photograph of the victim before her death during closing argument, and using an empty chair during closing argument to "represent" the victim. Pet. App. 16a.

During the penalty phase, the prosecution built on its guilt phase misconduct by continuing its pattern of improper activity. In addition, defense counsel introduced no mitigation evidence, despite the fact that they were aware that Frazier had sustained a severe brain injury which, in the opinion of post-conviction experts, affected Frazier's impulse control, social judgment and reasoning, and likely bore a correlation to his criminal conduct. *Id.* at 19a-21a . The sum total of the evidence presented on Frazier's behalf during the sentencing phase of the trial was an unsworn statement by Frazier denying his guilt. *Id.* On August 29, 1991, the trial court adopted the jury's recommendation that Frazier be sentenced to death. *Id.* at 6a.

Frazier appealed his conviction and sentence through the Ohio state courts, both on direct appeal and through a petition for post-conviction relief. He then initiated

federal proceedings for a writ of *habeas corpus* pursuant to 28 U.S.C. §2254 in September of 1998. *Id.* at 7a.

After the United States District Court for the Northern District of Ohio denied Frazier's petition, the Sixth Circuit affirmed with respect to his conviction but issued a conditional writ with respect to his sentence. The court determined that Frazier was denied his constitutional right to the effective assistance of counsel where Frazier's trial counsel failed both to investigate and present mitigating evidence during the penalty phase of the trial. *Id.* at 35a. Addressing the failure of Frazier's trial counsel to investigate or present any mitigation evidence, the Sixth Circuit noted that it "could conceive of no rational trial strategy that would justify the failure of Frazier's counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on the hope that the jury would spare his life due to any 'residual doubt' about his guilt." *Id.* at 21a. Applying a long list of cases from the Sixth Circuit as well as this Court, and considering record evidence that had been admitted both in the state post-conviction proceedings and in the district court, the Sixth Circuit held that the Ohio state court's determination that Frazier's trial counsel had performed in a competent manner during the penalty phase "was not simply erroneous, but unreasonable." *Id.*

Further, the Sixth Circuit concluded that "had the jurors been confronted with the mitigating evidence of Frazier's brain injury, the probability that at least one juror would not have decided that the aggravating circumstances of the case outweighed the mitigating circumstances of the case beyond a reasonable doubt 'is a probability sufficient to undermine confidence in the outcome'." *Id.* at 29a (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). Under *Strickland*, and under the framework for

habeas review established by the Antiterrorism and Effective Death Penalty Act of 1996 (28 U.S.C. §2254 et seq.), the Sixth Circuit reversed the judgment of the district court and granted Frazier a conditional writ of *habeas corpus* pending the State's initiation of a new penalty-phase trial. *Id.* at 35a.[1]

The court of appeals' grant of relief was limited to Frazier's sentence. Although the court was troubled by the pervasive prosecutorial misconduct that marked the guilt phase of the case, the court refused to say that the state court's disposition of that issue was unreasonable. *Id.* at 18a. Because, however, the court granted the conditional writ regarding Frazier's sentence on ineffective assistance of counsel grounds, the court determined that it was unnecessary for it to address his separate argument regarding the effect of the additional and more egregious misconduct at the penalty phase of his trial.

The State petitioned for rehearing and rehearing en banc, which the Sixth Circuit rejected.

REASONS FOR DENYING THE PETITION

The decision of the Sixth Circuit represents nothing more than an application of established law from this Court as well as of the Sixth Circuit itself. Petitioner raises two questions in its petition, neither of which presents a legitimate conflict among the circuits or question of national import that would warrant resolution by this Court. This case presents no issues that have not already been addressed by several decisions from this Court, including at least three recent cases: *Wiggins v. Smith*, 123 S. Ct. 2527 (2003); *Bell v. Cone*, 535 U.S. 685 (2002); *Williams v. Taylor*, 529 U.S. 362 (2000).

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[1] Judge Batchelder dissented on procedural default grounds, but the State had not raised that argument with respect to the ineffective assistance claim that was the grounds for relief (Pet. App. 32a), and the State has now abandoned that argument.

I. THE COURT OF APPEALS CORRECTLY APPLIED *STRICKLAND V. WASHINGTON.*

Petitioner first urges (Pet. 19) the Court to grant review to address the issue of whether the Sixth Circuit, in this particular case, correctly applied the presumption of adequate performance that, under *Strickland v. Washington*, 466 U.S. 668 (1984), is to be afforded defense counsel when analyzing constitutional ineffective assistance of counsel claims. That contention is unavailing.

A. The Court of Appeals Correctly Stated and Applied *Strickland*'s Presumption.

The State claims that the Sixth Circuit reversed the presumption afforded to defense counsel in this case. In so doing, however, the State misconstrues the Sixth Circuit's analysis of Frazier's counsel's performance at sentencing. Petitioner claims that the Sixth Circuit "presumed that trial counsel had behaved unreasonably in allegedly failing to investigate Frazier's brain injury." Pet. 13. In its opinion below, however, the Sixth Circuit clearly stated the correct direction in which the *Strickland* presumption flows:

> In order to avoid second-guessing trial counsel's strategic decisions, " a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."

Pet. App. 20a (quoting *Strickland*, 466 U.S. at 689). Indeed, the court of appeals went further and noted the distinction, under AEDPA, between applying "the first prong of *Strickland* unreasonably, or only erroneously." Pet. App. 23a (citing *Bell v. Cone*, 535 U.S. 685 (2002)). Thus, the state here is simply disagreeing with the way that the Sixth Circuit applied this Court's precedents in this particular case. There was no sweeping change in the law announced by the court or effectively adopted by it.

Far from reversing the *Strickland* presumption, the Sixth Circuit determined that Frazier overcame the initial presumption of reasonable performance by showing that trial defense counsel had available to it information suggesting serious brain injuries to Frazier which, had such information been investigated and developed properly, could have been used as valuable mitigation evidence at the penalty phase of the trial. Pet. App. 21a. In other words, the Sixth Circuit found that Frazier carried his burden of showing that defense counsel's actions at the penalty phase reflected no rational trial strategy.

The State now takes the Sixth Circuit and the district court to task for not conducting an evidentiary hearing before applying *Strickland*. But the State has not previously mentioned the need for an evidentiary hearing in this case. In fact, the Sixth Circuit specifically noted that the "state has not challenged the contention that Frazier's counsel could have developed this same information [regarding Frazier's brain impairment] had they conducted a reasonable investigation." Pet. App. 21a. Thus, the State, having decided not to make certain arguments in the courts below regarding Frazier's counsels' performance, now seeks to revisit that issue by claiming that an evidentiary hearing is necessary. This Court should decline that invitation.

B. The Sixth Circuit Decision Does Not Conflict With The Decisions of This Court.

In that same vein, the State quotes extensively from this Court's recent decision in *Massaro v. United States*, 123 S. Ct. 1690 (2003), a procedural default case that held that §2255 petitioners need not have raised claims of ineffective assistance of counsel on direct appeal to raise them on collateral review. The Court noted that an evidentiary hearing on collateral review to examine ineffective assistance claims was generally preferable because the trial record, standing alone, might not disclose enough information

to allow the court of appeals to make a *Strickland* determination on direct review. Nothing in *Massaro*, however, indicates that an evidentiary hearing is required to make such a determination. And, in fact, in noting that such claims could still be raised on direct review, the court stated that "[t]here may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal." 123 S. Ct. at 1696. The Court further found that "[t]here may be instances too, when obvious deficiencies in the representation will be addressed by an appellate court *sua sponte*." *Id.* In this case, the Sixth Circuit found Respondent's trial counsel's strategy to be "on its face irrational." Pet. App. 24a.

Moreover, the court of appeals decision here was based not only on the original trial record as, for example, the case would have been on direct review in *Massaro*, but also the record established both in the state and federal post-conviction proceedings. Based on that record, it was apparent to the court of appeals that Frazier's trial defense counsel knew about Frazier's head trauma, had chosen not to investigate further after being denied an independent expert by the trial court, and had nonetheless failed to introduce any mitigating evidence at trial.

The Sixth Circuit noted that Frazier's post-conviction experts identified a "significant history for head trauma" to Frazier's brain, and that the expert reports suggested a correlation between Frazier's head injury and his criminal conduct. Pet. App. 20a-21a. Recognizing that Frazier's trial counsel had reviewed his medical records and clearly knew about his brain injury at the time of trial, the Sixth Circuit concluded that no "reasonable attorney who saw the medical records indicating Frazier's brain injury would have declined to investigate the matter." Pet. App. 21a.

As the Sixth Circuit noted, the result in the present case is consistent with this Court's recent decision in *Wiggins v. Smith*, 123 S. Ct. 2527 (2003). In that case, this Court reversed the Fourth Circuit and determined that trial counsel's performance was constitutionally ineffective where they failed to fully investigate the defendant's life history despite the fact that they had two reports that indicated avenues for uncovering possible mitigation evidence. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003). In *Wiggins*, this Court noted that defense counsel relied solely on a pre-sentence investigation report and a Baltimore Department of Social Services report on defendant and that defense counsel failed to conduct any further investigations despite the fact that these reports suggested that defendant had a history of emotional difficulties and parental abandonment. *Id.* at 2537. This Court concluded that "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses" and that defense counsel's failure to investigate mitigation evidence thoroughly "resulted from inattention, not reasoned strategic judgment." *Id.*

Regarding *Strickland's* presumption of reasonableness, this Court noted in *Wiggins* that the state court "appears to assume that because counsel had *some* information with respect to petitioner's background...they were in a position to make a tactical choice not to present a mitigation defense." *Id.* at 2538. "In assessing the reasonableness of an attorney's investigation, however," this Court continued, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* This Court concluded its *Strickland* analysis by stating that the state court's deference to defense counsel's strategic decision not "'to present every conceivable mitigation

defense,' despite the fact that counsel based this alleged choice on what we have made clear was an unreasonable investigation" was an objectively unreasonable application of *Strickland*, thus warranting *habeas* relief under 28 U.S.C. §§2254(d), (e). *Id.* at 2538-2539 (quoting *Wiggins v. State*, 724 A.2d 1, 16 (Md. 1999)).[2]

This is precisely the analysis that the Sixth Circuit conducted in assessing the state court's application of *Strickland* to the performance of Frazier's trial counsel. Just as it was in *Wiggins*, the state court's deference to Frazier's trial counsel in the instant case was an objectively unreasonable application of *Strickland*. The Sixth Circuit was therefore entirely justified in granting *habeas* relief.

The above discussion similarly disposes of Petitioner's argument that the Sixth Circuit's decision will fundamentally alter and increase *habeas* litigation. Pet. 16. Contrary to Petitioner's claim, the Sixth Circuit has simply not adopted a "reverse presumption" for ineffective assistance of counsel claims, and 28 U.S.C. §2254(e) remains unaffected in its allocation of the burden of proof and the standards under which evidentiary hearings may be granted. The Sixth Circuit correctly cited the *Strickland* and AEDPA standards and applied them in this case in a manner consistent with this Court's precedents. In fact, there have been at least three subsequent decisions in the Sixth Circuit that have denied *habeas* relief based on the circumstances in those particular cases for ineffective assistance under the *Strickland* standard. *See. e.g., Campbell v.*

[2] The State suggests that the Sixth Circuit may have misconstrued *Wiggins v. Smith*, 123 S. Ct. 2527 (2003), to not require evidentiary hearings in these cases. Pet. 11 n.1. That argument is incorrect, the panel never cited *Wiggins* on this point and indeed never addressed a State argument regarding the need for an evidentiary hearing because the State never raised one. Moreover, as discussed above, the decision in this case was based on more than just the state trial record. As the Sixth Circuit itself has noted, it has both remanded for evidentiary hearings or granted writs depending on the case. *Johnson v. Bell*, 344 F.3d 567, 573 (6th Cir. 2003).

United States, ___ F.3d ___, No. 03-1178, 2004 WL 833611, *5 (6th Cir. Apr. 20, 2004) (Gilman, J.) (applying *Strickland* presumption to deny relief); *Smith v. Mitchell*, 348 F.3d 177, 205-06 (6th Cir. 2003) (distinguishing *Frazier*); *Johnson v. Bell*, 344 F.3d 567 (6th Cir. 2003), *cert. denied*, ___ U.S. ___, 2004 WL 377000 (Apr. 26, 2004). These results fatally undermine the State's claim that the court of appeals in this case fundamentally altered the *habeas* landscape in the Sixth Circuit with respect to *Strickland* claims.

II. THE SIXTH CIRCUIT'S DECISION DID NOT ADOPT A NEW RULE WITH RESPECT TO RESIDUAL DOUBT MITIGATION THAT CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

Petitioner next urges (Pet. 19) this Court to grant review in order to address the Sixth Circuit's treatment of residual doubt as a mitigation theory. The State claims that the Sixth Circuit has ruled out the application of residual doubt as a mitigation theory in all cases as a *per se* rule. Once again the State distorts the court of appeals' holding and exaggerates its possible reach – this time in an attempt to manufacture a circuit court conflict that simply does not exist. The panel, again in the circumstances of this case, determined that defense counsel's mitigation performance was constitutionally deficient.

A. The Sixth Circuit Panel Did Not Adopt A *Per Se* Rule Against the Use of Residual Doubt at Mitigation.

The panel did not adopt a rule that arguing residual doubt is, in all cases, invalid. There was no *per se* rule announced by the panel that applies in all cases. This is apparent from the opinion itself.

The panel specifically cited the Sixth Circuit's previous decision in *Scott v. Mitchell*, 209 F.3d 854, 881 (6th Cir. 2000), which had concluded that under the circumstances of that case, residual doubt was a reasonable strategy. Pet. App. 22a-23a. The panel in this case cited and distinguished *Scott* – it did not overrule or purport to alter

it in anyway – which surely would have happened had the panel in this case announced a new *per se* rule.

The State makes much of the panel's notation that residual doubt is no longer a valid mitigating factor as a matter of Ohio state law. But as shown above by its acknowledgment of *Scott*, the panel did not regard this state law issue as dispositive on the *Strickland* question in this case. In fact, residual doubt is no longer a mitigating factor under Ohio state law. Pet. App. at 22a (*citing State v. McGuire*, 686 N.E.2d 1112 (Ohio 1997)). The Ohio Supreme Court further held in *State v. Bey*, 709 N.E.2d 484 (Ohio 1999) that *McGuire's* holding regarding residual doubt applies retroactively.[3]

But this is now beside the point. The argument over the residual doubt strategy in this case overlooks two critical considerations that apply in this case: first, the structure of Ohio's death penalty scheme in cases like this one, and second, the availability of other mitigation arguments and the putative potential negative ramifications of pursuing such alternate theories of mitigation.

Under Ohio's death penalty scheme, the aggravating circumstances have already been proven beyond a reasonable doubt when the mitigation phase of the trial begins. Ohio Rev. Code §2929.04. Thus, in Ohio, a capital defendant at the penalty phase has already been found guilty of a death specification and should generally present *some* mitigating evidence, if he has any, in order to avoid the death penalty; otherwise, it is

[3] The State cites *State v. Smith*, 731 N.E.2d 645 (Ohio 2000) for the proposition that trial counsel's performance is not constitutionally ineffective where it pursues a residual doubt strategy at a penalty phase prior to 1997 in Ohio. However, *State v. Smith* is distinguishable from this case. Namely, defense counsel in that case presented numerous witnesses during the penalty phase, including defendant's wife, mother, and psychologist. *Id.* at 649-50. In *Smith*, residual doubt was only one of many types of evidence presented for mitigation at the penalty phase.

practically guaranteed that the aggravating circumstances will outweigh the (non-existent) mitigating factors. *Mapes v. Coyle*, 171 F.3d 408, 426 (6th Cir. 1999) (under Ohio's capital scheme, "a capital defendant found guilty of a death specification has to present *some* mitigating evidence in order to avoid the death penalty"), *cert. denied*, 528 U.S. 946 (1999); *see also Smith v. Stewart*, 140 F.3d 1263, 1270 (9th Cir.), *cert. denied*, 525 U.S. 929 (1998). In the case at bar, the sum total of the evidence presented by defense counsel at mitigation was an unsworn statement by Frazier denying his guilt. Pet. App. 19a. The panel determined that Petitioner's lone unsworn statement was inadequate in this case in light of the availability (as discussed below) of substantial medical, psychological, and social evidence that defense counsel failed to investigate and present, it was objectively unreasonable for defense counsel to rely on Frazier's unsworn statement to be weighed against the evidence of guilt and aggravating circumstances that had been proved beyond a reasonable doubt by the prosecution.[4]

B. The Panel's Decision Does Not Create a Circuit Conflict.

Petitioner suggests that the Sixth Circuit's decision conflicts with the decisions of other courts of appeals. Pet. 21. But that argument is based solely on the false premise that the Sixth Circuit has created a *per se* rule against the presentation of residual doubt arguments in all cases in the circuit. As shown above, in light of its acknowledgment of Sixth Circuit caselaw coming to different conclusions, the panel created no such rule. In any event, the cases that Petitioner cites are easily distinguishable from the case at bar, and a close comparison of them to the present case makes plain that the Sixth Circuit has created no such *per se* rule as Petitioner suggests.

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[4] It should be noted that even with respect to cases from Ohio, the panel did not adopt a *per se* residual doubt rule, as shown by its discussion of *Scott*.

Petitioner notes that in *Parker v. Sec'y Dep't of Corrections*, 331 F.3d 764 (11th Cir. 2003), *cert. denied*, 124 S. Ct. 1513 (Mar. 1, 2004), the Eleventh Circuit held that defense counsel was not ineffective where it pursued a residual doubt argument at mitigation over other alternate theories, thereby "rejecting" the approach that the Sixth Circuit adopted in the present case. Pet. 22. In *Parker*, however, defense counsel conducted a thorough investigation into alternate mitigation evidence and came to a reasoned conclusion that developing and presenting such alternate evidence would either be ineffective as a mitigation strategy or adverse to the defendant. Nevertheless, in the end, during the penalty phase defense counsel put the defendant's mother on the stand and introduced letters commending the defendant for his work in a "scared straight" anti-drug program in addition to appealing to any lingering doubts of the defendant's guilt. *Id.* at 782. Thus, on these facts, the Eleventh Circuit concluded that the petitioner was not entitled to relief. That decision, however, did not announce a legal principle or rule that puts it in conflict with the Sixth Circuit.

Similarly, the second case cited by Petitioner (Pet. 22), *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003), *cert. denied*, ___ U.S. ___, 2004 WL 717262 (2004), is distinguishable. Petitioner notes that the Tenth Circuit found reasonable defense counsel's decision not to introduce evidence of defendant's organic brain syndrome during the penalty phase but to instead argue residual doubt. Pet. 22, 23. In *Bryan*, the defendant himself vigorously rejected the use of mental health evidence. *Bryan*, 335 F.3d at 1223. Distinguishing the facts of *Bryan* from those of *Wiggins v. Smith* (discussed above), the Tenth Circuit noted that defense counsel in *Bryan* (i.e., the fourth attorney) was "fully aware of defendant's history of mental illness," concerned that the testimony

of a psychologist "might do more harm than good during the penalty phase," and "conscious of his client's consistently expressed refusal to rely on mental health evidence." *Bryan*, 335 F.3d at 1224. Defense counsel in *Wiggins*, in contrast, "had conducted a plainly inadequate investigation, and because copious and powerful mitigating evidence would have been discovered if an adequate investigation would have been conducted, the court concluded that counsel's failure to present mitigation evidence during the penalty phase was not insulated from review as a strategic decision and was, in fact, unreasonable." *Id.* at 1224, n.25. As with *Parker*, the decision of Bryan's defense counsel is the kind of strategic choice that, under *Strickland*, is "virtually unchallengeable." *Id.* (quoting *Wiggins v. Smith*, 123 S. Ct. at 2535).

Consistent with *Parker* and *Bryan*, and contrary to Petitioner's assertions, nowhere does the Sixth Circuit suggest that presenting residual doubt over mental health evidence during the penalty phase is in every case irrational. The Sixth Circuit acknowledged that in some cases, presenting certain mitigating evidence at the penalty phase could backfire, opening the door to evidence bearing even more poorly on the defendant. Pet. App. 22a-23a. But the Sixth Circuit found that "[n]o such concerns could have justified the approach in the present case, however, where the jury had already heard considerable evidence about Frazier's rape of Skiba." *Id.*

Additionally, the Sixth Circuit suggests that defense counsel could have satisfied *Strickland* had it, at a minimum, "compared [Frazier's medical] records with the medical literature on brain damage, elicited information from Frazier himself about the injury and its effects on him, or presented the records on Frazier to someone who could competently evaluate them." *Id.* at 21a-22a. Had counsel conducted such an investigation and, based

on its judgment of the efficacy of the resultant evidence, decided to present only residual doubt at the penalty phase, the Sixth Circuit may well have viewed counsel's decision as reflecting a rational trial strategy that is owed deference under *Strickland*. As this Court stated in *Strickland*, however, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690, 91. And, as the Sixth Circuit noted, the state has not challenged the contention that trial counsel could have developed additional information.

Thus, echoing this Court's holding in *Wiggins* when presented with similar facts, the Sixth Circuit correctly concluded that no "reasonable attorney who saw the medical records indicating Frazier's brain injury would have declined to investigate the matter," and that consequently the state court's determination that Frazier's counsel performed competently was "not simply erroneous, but unreasonable." Pet. App. 21a.-22a., 26a. (cf. *Wiggins*, 123 S. Ct. at 2542 ("In deferring to counsel's decision not to pursue a mitigation case despite their unreasonable investigation, the Maryland Court of Appeals unreasonably applied *Strickland*.")).

The Sixth Circuit's conclusion regarding the negative evidence already in front of the jury by the time that the mitigation phase had started also directly rebuts Petitioner's argument that the Sixth Circuit's decision conflicts with *Williams v. Woodford*, 306 F.3d 665 (9th Cir. 2002). There, the Ninth Circuit held that trial counsel may reasonably focus on residual doubt where raising alternative mitigation evidence would allow the State to introduce negative rebuttal evidence. In fact, Petitioner implicitly acknowledges that the Sixth Circuit's decision "conflicts" with *Williams* only "to the extent that the Sixth

Circuit failed to consider the impact of rebuttal evidence against Frazier." Pet. 25. As the Sixth Circuit's decision makes plain, though, that court in fact did consider the impact of such evidence against Frazier and concluded that, under the Ohio capital scheme and the facts of this case, it could not possibly justify the failure to investigate and present mitigation evidence regarding Frazier's brain injury. In this regard, then, the Sixth Circuit's decision is entirely consistent with *Williams*.

In sum, the cases cited by the State, which deny *habeas* relief to petitioners, are all distinguishable, given the facts and circumstances unique to those cases, from this one. The Sixth Circuit's opinion is devoid of broad legal pronouncements that would put it in conflict with other courts of appeals. That different results have occurred in different cases does not make this case appropriate for this Court's review.

III. THIS CASE IS NOT A GOOD VEHICLE FOR REVIEW.

Finally, the substantive arguments against the merits of the State's petition for writ of certiorari aside, this case is simply not a good vehicle for this Court to address the Constitutional issues regarding ineffective assistance of counsel. The Sixth Circuit granted relief to Respondent on the grounds that he did not receive constitutionally mandated effective assistance of counsel at his mitigation phase. That particular ground for relief has been the subject of many decisions of this Court. Petitioner has given no compelling reason why the present case stands out as distinguished from any of these.

Importantly, although the Sixth Circuit granted Frazier a conditional writ of *habeas corpus* based on the ineffective assistance of his trial counsel during the penalty phase, the panel's decision made it clear that there was such pervasive prosecutorial misconduct throughout both the guilt and penalty phases that had the panel considered

Frazier's claim of prosecutorial misconduct in the first instance, it "might be persuaded that [Frazier] was denied a fundamentally fair trial." Pet. App. 18a. Particularly egregious were the prosecutor's repeated references to the victim's character during his closing and rebuttal arguments during the guilt phase and the prosecutor's use of an empty chair to "represent" the victim during closing arguments. *Id.* at 17a, 18a. Indeed, even the dissent concurred in the majority's treatment of the prosecutorial misconduct issue. *Id.* at 36a.

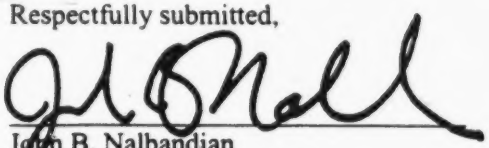
Were this Court to grant Petitioner the writ of certiorari and hear this case, these guilt phase episodes of misconduct would be combined with the even more frequent and more egregious instances of misconduct at the penalty phase. Thus, given the panel's already skeptical view of the prosecution's conduct at the guilt phase alone, there is a likely possibility that Respondent will achieve the same result on remand to the court of appeals based on prosecutorial misconduct. At this point, it makes no sense for this Court to grant review of this case.[5]

[5] It should also be noted that the panel declined to consider numerous of Respondent's other claims, given its holding. Pet. App. 32a-33a.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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